122

No. _____

In the Supreme Court of the United States

DEAN SENECA,

Petitioner,

v.

UNITED SOUTH AND EASTERN TRIBES, et al.,
and
UNITED STATES OF AMERICA

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals impermissibly expanded the intent of the Indian Self-Determination Act by applying a "liberal" standard to bring within its scope libelous conduct directed by tribal officials against a federal agency official?

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APPENDIX

TABLE OF AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Dean Seneca respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is unpublished. Appendix ("App.") at 1a -12a. The court's order denying rehearing and rehearing en banc is unreported. App. At 26a - 27a. The opinion of the district court is unreported. App. At 13a - 25a.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 2008. App. at 1a. A timely petition for rehearing was denied on December 11, 2008. *Id.* at 26a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS, EXECUTIVE ORDER AND PRESIDENTIAL MEMORANDUM INVOLVED

Relevant portions Section 450f(a)(1) and Section 450l(c) of the Indian Self-Determination and Education Assistance Act ("ISDEAA"), 25 U.S.C. § 450, *et seq.*, are set forth in an appendix to this petition. App. at 28a - 29a.). These specific language of these relevant provisions of the ISDEAA provide:

25 U.S.C. § 450f(a)(1) titled "Self-determination

contracts" -

> *The programs, functions, services, or activities that are contracted under this paragraph shall include administrative functions of the Department of the Interior and the Department of Health and Human Services (whichever is applicable) that support the delivery of services to Indians, including those administrative activities supportive of, but not included as part of, the service delivery programs described in this paragraph that are otherwise contractable.* The administrative functions referred to in the preceding sentence shall be contractable without regard to the organizational level within the Department that carries out such functions. (Emphasis added).

25 U.S.C. § 450l(c) titled "Contract or Grant Specification - Model Agreement" -

> (2) Purpose.—Each provision of the [ISDEAA] (25 U.S.C. 450 et seq.) and *each provision of this Contract shall be liberally construed for the benefit of the Contractor to transfer the funding and the following related functions, services, activities, and programs (or portions thereof), that are otherwise contractable under section 102(a) of such Act, including all related administrative functions,*

> *from the Federal Government to the Contractor: (List functions, services, activities, and programs).* (Emphasis added).

Executive Order 13175 (App. at 30a - 38a) signed by President William J. Clinton on November 9, 2000 titled "Consultation and Coordination With Indian Tribal Governments" states, *inter alia*:

> By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian tribes; it is hereby ordered as follows:

This Executive Order imposes mandates upon federal agencies to honor "fundamental principles" in formulating, implementing and consulting with tribes on policies that have tribal implications. App. at 31a.

Presidential Memorandum for the Heads of Executive Departments, and Agencies: Government-to-Government Relationship with Tribal Governments, signed by President George W. Bush on September 4, 2004. App. at 39a - 40a. This Presidential Memoran-

dum recognizes continuing adherence to Executive Order 13175 states, *inter alia*,

> More recently, Executive Order 13175, entitled Consultation and Coordination with Indian Tribal Governments, was issued in 2000. I reiterated my Administration's adherence to a government-to-government relationship and support for tribal sovereignty and self-determination earlier this year in Executive Order 13336, entitled American Indian and Alaska Native Education.

STATEMENT OF THE CASE

Free, open and frank dialogue and verbal discourse have long played a crucial role in strengthening the "government-to-government" relationship between the federal government, acting through its numerous agencies, to over 500 tribal governments.

Federal agencies and their directors are compelled by executive policies to interact with tribes "regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications." App. at 30a.

Often, blunt discussions between agency directors and tribal officials (or those lawfully authorized to speak on their behalf) encourages the allocation of limited federal funds to ensure ISDEAA program success. The vast majority of the thousands

of telephone calls and personal meeting where federal agency directors and tribal officials converse on federal policies are impromptu and "off-the-record."

Without the ability to engage in free verbal discourse on broad ranging issues dealing with ISDEAA matters, the essential openness and candor that is the essence of the federal government's relationship with tribes is lost.

This case raises a question of broad and general importance: What is the proper interpretation of key provisions and standards set forth in 25 U.S.C. § 450f and § 450l(c)? The answer to this question affects the actions of every federal official required to deal with federally-recognized Indian tribes executing ISDEAA contracts with federal agencies, primarily the U.S. Department of Interior, Bureau of Indian Affairs and the U.S. Department of Health and Human Services ("DHHS").

This Petition raises the fundamental and essential question of whether the federal courts can classify each and every verbal exchange between federal agencies and tribes as falling within the boundaries of "administrative functions" language in the ISDEAA.

A. Background

The United States of America has long recognized the existence of a "government-to-government" relationship with Indian tribes. Federal agencies like the DHHS are bound by the mandates of

Executive Orders in maintaining the unique "government-to-government" relationships with tribes, including those who have decided to steer a course of "self-determination" provided by the ISDEAA. It is within the complicated boundaries of "Federal Indian Law" that a federal agency official must deal with tribal governments.

For example, Dean Seneca was the Director of the Agency for Toxic Substances and Disease Toxic Substances and Disease Registry ("ATSDR") Office of Tribal Affairs on July 5, 2006. It was on this date, that James Martin, acting Executive Director of the United South and Eastern Tribes, Inc. ("USET") filed a complaint with ATSDR against Mr. Seneca. App. at 13a - 14a.

As Director of the ATSDR Office of Tribal Affairs, he was required by Executive Order to "encourage Indian tribes to develop their own policies to achieve program objectives." App. at 33a. Bound by his duties in this regard, Seneca sought "interactions" between himself and USET staff members during the spring of 2006. App. at 14a. The focus of these "interactions" was to encourage, assist and aid in the preparation of testimony by USET representatives before DHHS in March and May of 2006 on matters dealing with the Agency's budget for fiscal year 2008. *Id.*

In the course of encouraging these interactions with USET staff members, Seneca had to maintain an awareness of those statutory mandates imposed on him by the ISDEAA. It was within this complex area

of federal and tribal law and regulation and executive directives to federal agencies, that allegations were leveled against Seneca that he engaged in inappropriate behavior considered by USET to be slanderous, bullying, threatening and disparaging. *Id.*

Seneca disputed these allegations by Martin and others and filed an action on July 23, 2007 against USET, Martin, Lisa Berrios and Brenda Shore for libel, interference with employment, intentional infliction of emotional distress, invasion of privacy, and injury to peace, happiness and feeling based on the July 2006 communications on Agency budget considerations for fiscal year 2008. App. at 16a.

B. Prior Proceedings

1. United States District Court for the Northern District of Georgia - Atlanta Division.

Dean Seneca's tort case against the individually named USET officials was dismissed on the basis of the United States Attorney's certification that they were acting within the scope of their employment and performing under a self-determination contract at the time his claims arose. App. at 22a.

The district court reasoned that the *contract* entered into with DHHS bound the parties to "facilitate meaningful consultation between agencies of [HHS] and tribes." App. at 20a. Further, the district court found that the clause including the language quoted in the preceding sentence sufficiently encompassed USET's "preparation for and per-

formance of its testimony before HHS in spring 2006 . . .". *Id.*

Alternatively, the district court left the language of "just-quoted clause of the contract" aside and interpreted the ISDEAA as directing DHHS to delegate "administrative functions" required to execute the substantive program delegated to tribal organizations. App. at 21a.

Under the heading of "information-gathering and budget-formulation", the district court expanded the operational scope of the ISDEAA to include *all* of the thousands of verbal discussions, *even if allegedly false and defamatory.*

Finally, the district court examined the ISDEAA contract in place at the time Seneca's claims arose that follows the language of the model provision described at 25 U.S.C. § 450l(c):

> Consequently, in light of the contract's directive that its "provision[s] . . .shall be liberally construed for the benefit of USET, the Court is convinced that the USET employees were performing under the self-determination contract at the time Seneca's claims arose.

In applying a "liberal" standard, the district court instantly expanded the specific provisions of the ISDEAA contract examined here to sweep within its confines *the substance of all verbal discourse, i.e., formal or informal, on the record or off-the-record and*

other innocuous verbalisms exchanged back and forth between federal agencies and tribes on a daily basis.

2. Court of Appeals for the Eleventh Circuit.

The court of appeals affirmed the substitution of the United States as defendant. In affirming the district court's dismissal of Senecas tort claims against USET employees, the court of appeals framed the question (App. at 9a) as:

> The question before us is whether, at the time of the events giving rise to this cause of action, the employees named as defendants were acting pursuant to USET's self-determination contract with HHS/IHS or whether they were acting in furtherance of USET's other duties.

The court of appeals opined that the district court's conclusion that the USET employees were acting under an ISDEAA contract between the U.S. government and USET was not clearly erroneous. The court engaged in its own analysis of the alleged substance of the tort claims asserted by Seneca that the conduct in issue fell outside of the contract (App. at 10a):

> Furthermore, even if the testimony itself fell outside of the contract, the conduct that actually led to the tort claims - the writing of complaint letters to Seneca's supervisor - falls within the scope of the

self-determination contract.

Clearly, the court of appeals affirmation of the dismissal stood on the mere existence of a "relationship" established by contract and not the merits of whether Seneca himself was subjected to provisions of a ISDEAA contract authorizing libel by USET employees with some sort of "axe to grind". Why should these employees tortuous actions be protected as their behavior is clearly outside of the scope of the contract.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE QUESTIONS OF BROAD AND GENERAL IMPORTANCE THAT DEAL WITH THE INTERPRETATION OF THE ISDEAA.

Dean Seneca frames the question for this Honorable Court to grant his Petition as:

> Whether the Court of Appeals impermissibly expanded the intent of the Indian Self-Determination Act by applying a "liberal" standard to bring within its scope libelous conduct directed by tribal officials against a federal agency official?

In effect, the Court of Appeals impermissibly expanded the Indian Self-Determination Act to include as "administrative functions" *all* verbal exchanges

between federal and tribal officials performed under the ISDEAA contract. This erroneous expansion of provisions in the contract resulted in the validation of malicious and false characterizations of Dean Seneca's conversations with USET officials.

This case concerns a scheme by tribal officials to defame a deeply dedicated tribal advocate, Dean Seneca, and his efforts to vindicate this personal wrong in the federal courts. These tribal officials aimed false accusations at him which were forwarded to his supervisors.

It was error for the lower courts to apply a "liberal" standard to the ISDEAA that brought within the scope of the Federal Employees Liability Reform and Tort Compensation Act of 1988, 28 U.S.C. § 2679(d) libelous statements that were not "contractable" under any stretch of the imagination.

The essence of those matters construed by the Court of Appeals and the District Court as properly within the ISDEAA were purely verbal in nature. Consequently, the communications from the tribal officials to Seneca's supervisor were incapable of falling within the meaning of "administrative functions" that are "contractable" within the meaning of the ISDEAA. False accusations like those leveled at Seneca cannot be contracted as a program "deliverable" nor should they be considered as a necessary part of "preserving the working relationship with ATSDR". App. at 10a.

In addition to adhering to their regulatory

duties, DHHS officials, like Dean Seneca, are compelled to follow Executive Orders describing the parameters of their interaction when they consult and coordinate with tribal officials. App. at 30a - 40a. They have an already difficult job of steering their actions through a maze of laws and regulations governing the maintenance of the federal trust relationship between tribes and federal agencies.

Because of the inherent friction between tribes and the U.S. government in a variety of areas subject to chance, it cannot be doubted that tribal officials want to "grind their axes" against the discretionary opinions or regulatory interpretations that they perceive as going against their interest.

When the lower courts applied a "liberal" standard to construe false accusations leveled against Seneca by tribal officials as "perform[ance] under the self-determination contract at the time [his] claims arose" (App. at 21a), thousands of dedicated federal officials must now be very concerned. They must watch what they say and how they say it for fear of misinterpretation and retaliation by tribal officials who will then hide behind the sovereign immunity of the United States..

Frank and, often blunt, verbal exchanges between DHHS officials and ISDEAA tribes on matters of mutual concerns, such as the budgeting of limited federal dollars, is a fundamental principle underscoring the success of federal programs that benefit tribal governments.

By imposing a "liberal" standard, there is the potential that the otherwise defamatory statements of tribal officials will be reported to someone's federal supervisor and mislabeled as an "administrative function" under ISDEAA. Likewise, there is now the high risk that the well-intentioned verbal advocacy of DHHS officials will subject them to personal vendettas and malicious schemes by tribal officials to ruin their careers and reputations *without* sufferance of legal liability.

As for the lower courts' reliance on an erroneous imposition of a "liberal" standard in this case, it conflicts with the "lubricant", free and unimpeded verbal discourse, necessary to encourage the efficient interaction of any federal agency dealing with tribes under the ISDEAA on a broad range of issues, some routine and some controversial.

Equally, it is a matter of deep concern to every one of the thousands of federal official who must express themselves freely and frankly on a multitude of matters related to ISDEAA grant implementation without fear of facing false accusations or retribution from tribal officials that they were engaging in "inappropriate behavior".

If allowed to stand, the court of appeals decision will encourage the "chilling" of frank dialogue between federal agencies and tribes because that dialogue could be wrongfully taken as slanderous, bullying, threatening and disparaging. At worst, the innocent dialogue could be intentionally and maliciously labeled by tribal officials as impeding any class of "working relation-

ship" between agencies and tribes and reported up the ranks to ruin a victim's career or position with the agency.

The Court of Appeals impermissibly expanded the intent of the Indian Self-Determination Act by applying a "liberal" standard to bring within its scope libelous conduct directed by tribal officials toward a federal agency official.

This liberal interpretation of ISDEAA provisions has extremely broad and serious implications to the ability of federal officials to encourage meaningful dialogue with tribes who may have known and unknown adverse interest toward the federal policies promoted by the agency and its officials.

CONCLUSION

This Court should grant the petition for writ of certiorari.

DATED: March 6, 2009 Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
DECIDED SEPTEMBER 16, 2008

08 - 11012
Non-Argument Calendar

DEAN SENECA,

Plaintiff-Appellant,

- v -

UNITED SOUTH AND EASTERN TRIBES, et al.,

Defendants,

UNITED STATES OF AMERICA,

Defendant-Appellee.

DECIDED: September 16, 2008

Before TJOFLAT, BLACK and KRAVITCH, Circuit Judges. PER CURIAM:

DECISION

Dean Seneca appeals the district court's order substituting the United States for the named defendants and dismissing his tort claims for failure to exhaust administrative remedies under the Federal Tort Claims Act. For the reasons stated below, we affirm.

BACKGROUND

Congress has provided for Indian tribes and tribal organizations to enter into agreements with the United States called "Self-Determination Contracts" whereby the tribe or organization takes on responsibility for programs or services to Indian populations that otherwise would have been provided by the Federal government. 25 U.S.C. § 450b(j). The tribe or organization receives Federal funds to help it operate those programs and services.

United South and Eastern Tribes ("USET") is a non-profit organization that represents numerous American Indian tribes collectively. USET entered into a self-determination contract with the U.S. Department of Health and Human Services / Indian Health Service ("HHS/IHS") to assist with health programs. The contract stated that, among other things, USET would provide timely dissemination of health information to the Tribal Health Programs in the Nashville Area, administrative services in coordinating and facilitating the meetings and activities of the Health Committee, and technical assistance to all area tribes with regard to the continuing development of their health programs. This contract also stated that it was to be "liberally construed for the benefit of the Contractor."

In 2006, USET was asked to represent American Indian and Alaskan Native Tribes and testify before HHS's Tribal Budget Consultation Session and the National Divisional Budget

Formulation and Consultation Session.

Dean Seneca was employed by the Agency for Toxic Substances and Disease Registry ("ATSDR") as the Assistant Director of the Office of Tribal Affairs. Prior to the budget meetings, Seneca attempted to contact employees at USET through phone calls, emails, and personal encounters to tell them what to include in their testimony. James Martin, then Executive Director of USET, wrote a letter to Seneca's supervisor complaining about Seneca having contacted him and other USET employees inappropriately regarding the testimony. Seneca's supervisor requested additional information and evidence, and USET supplied a second, more detailed letter about Seneca's misconduct. Seneca's job did not, apparently, require him to contact USET about the testimony, and the letter stated that his manner was also inappropriate and aggressive.

As a result of the investigation into these complaints from USET, Seneca was officially reprimanded by his employer, removed from his position at the Office of Tribal Affairs, and reassigned to another division within ATSDR. Seneca submitted an internal administrative grievance to his employer, the CDC, challenging his reassignment and claiming that the allegations against him in the letters from USET were false. In the grievance, Seneca requested reinstatement to his former position, additional training, and attorneys' fees and costs.

Seneca also filed this tort suit[1] against USET, and three USET employees for making false statements disparaging him. Acting U.S. Attorney Sally Quillian Yates submitted a certification that the named defendants were acting in the scope of their employment as Federal Employees. The certification stated that Ms. Yates had reached this conclusion after reviewing the Indian Self-Determination Agreement between the United States and USET and the declaration of Daretia Hawkins, an attorney for HHS, wherein Ms. Hawkins states her opinion that USET is a tribal contractor entitled to Federal Torts Claims Act ("FTCA") coverage. The U.S. then filed a Notice of Substitution requesting that the United States be substituted as the defendant pursuant to the Federal Employees Liability Reform and Tort Compensation Act, 28 U.S.C. § 2679(d). The district court granted the substitution and then dismissed the case for failure to exhaust administrative remedies under the FTCA.

DISCUSSION

When an Indian tribe or tribal organization operates pursuant to a self-determination contract and its employees operate within the scope of their employment in carrying out such a contract or agreement, the organization is considered a part of the Federal government and its employees are considered Federal employees for the purposes of the FTCA. See

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1/ Seneca alleged libel, interference with employment, intentional infliction of emotional distress, invasion of privacy, and injury to his peace, happiness and feeling.

25 U.S.C. § 450f. "When a federal employee is sued for a wrongful or negligent act, the Federal Employees Liability Reform and Tort Compensation Act of 1988 (commonly known as the Westfall Act) empowers the Attorney General to certify that the employee 'was acting within the scope of his office or employment at the time of the incident out of which the claim arose.'" Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 419-420 (1995) (quoting 28 U.S.C. § 2679(d)(1)). After certification, the named defendant employee is dismissed from the action and the United States is substituted as the defendant; the case is then governed by the FTCA. Id.

A. Was the Certification by the U.S. Attorney Sufficient?

Seneca first challenges the sufficiency of the certification made by the U.S. Attorney. Seneca argues that the certification was inadequate because it failed to specify that the defendants were acting within the scope of their Federal employment *pursuant to* an Indian self-determination contract. We find that this specification was not required, and that the certification was complete.[2]

Under the law, the United States shall be substituted as the defendant "[u]pon certification by

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2/ The Supreme Court has determined that Federal courts may review the U.S. Attorney's scope-of-employment certification. Guiterrez, 515 U.S. at 420; see also Flohr v. Mackovjak, 84 F.3d 386, 390 (11th Cir. 1996).

the Attorney General[3] that the defendant employee was acting within the scope of his office or employment at the time of the incident our of which the claim arose . . . ." 28 U.S.C. § 2679(d)(1). U.S. Attorney's Yates' certification provided exactly this information. The certification stated "the individual named defendants . . . were acting within the scope of their employment as employees of the Government at the time of the events alleged." This language satisfied the requirements of 28 U.S.C. § 2679(d)(1). We find the appellant's argument that the certification needed to state explicitly that the defendants were acting within the scope of their Federal employment pursuant to an Indian self-determination contract unpersuasive and without authority.

B. Was the Substitution of the United States as the Defendant Proper?

"[A]lthough the Attorney General's certification is *prima facie* evidence that the employee acted within the scope of his employment, the district court . . . decide[s] the issue de novo." Flohr, 84 F.3d at 390. "However, the burden of altering the status quo by proving that the employee acted outside the scope of employment is on the plaintiff." Id. (internal quotation and alterations omitted). Seneca argues that the named defendants were acting outside the scope of

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3/ This responsibility has been delegated to the U.S. Attorneys. See 28 C.F.R. § 15.4.

their Federal employment because (I) there is no valid self-determination contract, or, alternatively, (ii) that the defendants were operating outside that agreement at the time of the alleged tortuous conduct.

I. Was there a valid self-determination contract?

Seneca argues that the named defendants could not have been acting within the scope of Federal employment because there is no valid self-determination contract. Seneca asserts that the self-determination contract was not properly authorized by USET's member tribes. Seneca argued to the district court that the self-determination contract was invalid because the contract itself did not include tribal resolutions approving of the contract. On appeal, Seneca contends that the contract was invalid because the tribal resolutions provided by the defendants as supporting the contract pre-date the self-determination contract and did not refer specifically to the contract USET and HHS entered into in October 2001 that appellee has presented as the governing self-determination contract.[4] We review arguments not before the district court for plain error. U.S. v. Mock, 523 F.3d 1299, 1302 (11th Cir. 2008). Because we find that the resolutions do support the contract, we find no

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4/ Seneca argues on appeal only that the resolutions are outdated and non-specific; he has thus abandoned his argument that the self-determination contract was not supported by a resolution. See United States v. Cunningham, 161 F.3d 1343, 1344 (11th Cir. 1998) (arguments not made on appeal are abandoned).

plain error.

For a self-determination contract to be valid, it must be made "upon request by *any* Indian tribe by tribal resolution," and must be authorized by "*an* Indian tribe." 25 U.S.C. §§ 450f(a)(1), 450f(a)(2). It is, therefore, not necessary for each and every USET member tribe to provide a resolution supporting the self-determination contract; it is enough if one member tribe did so. USET provided numerous resolutions in support of contracts between itself and the U.S. government.

Although not specifically drafted in reference to the October 2001 self-determination contract at issue here, these resolutions refer to and authorize contracts between USET and the U.S. government explicitly for Health Information Office programs with Indian Health Services of the type at issue here. These resolutions are not time-restricted nor limited to a single contract, and the resolutions state that they "continue until rescinded" and request "contracting" with HHS/IHS rather than requesting one specific contract. We find that these resolutions thus support the October 2001 self-determination contract for HHS/IHS Health programs.

ii. Were the named defendants acting within the scope of the self-determination contract when Seneca's claims arose?

In this case, we are presented with an employer that operates under dual purposes. The USET operates as a Federal contractor under certain circum-

stances, but also appears to have separate and distinct responsibilities as a representative of numerous Indian tribes. The question before us is whether, at the time of the events giving rise to this cause of action, the employees named as defendants were acting pursuant to USET's self-determination contract with HHS/IHS or whether they were acting in furtherance of USET's other duties.

The district court found that the named defendants were acting pursuant to the self-determination contract. The district court noted that the contract required USET to "facilitate meaningful consultation between agencies of [HHS] and tribes" and that USET's testimony regarding the health programming needs of the tribal community improved HHS's understanding of that issue. Additionally, the district court noted that the information-gathering and budget formulation regarding which Seneca contacted USET fell under the "administrative functions" necessary to carry out the self-determination contract that were delegated to tribal organizations, 25 U.S.C. § 450f(a)(1). The court then held that, in light of the contract's provision that it be construed liberally for the benefit of USET, USET's employees were acting within the scope of the self-determination contract, and therefore, within the scope of their Federal employment.

"The question of whether a given act falls within the scope of employment is highly fact-specific, and turns on the unique circumstances of the case at bar." Bennett v. United States, 102 F.3d 486, 489 (11th Cir. 1996). This finding of fact is reversible only if "clearly

erroneous." United States v. Zapata, 180 F.3d 1237, 1240 (11th Cir. 1999).

The district court's conclusion that these named defendants were acting pursuant to the self-determination contract between the U.S. government and USET was not clearly erroneous. The testimony spoke to the need for funding for tribes to administer health programs; this knowledge is related to USET's role in administering health programs. Because of the close connection between the topic of the testimony and USET's work for HHS, it was not clearly erroneous to conclude that the preparation of that testimony was within the scope of the employment for HHS.

Furthermore, even if the testimony itself fell outside of the contract, the conduct that actually led to the tort claims—the writing of complaint letters to Seneca's supervisor—falls within scope of the self-determination contract. USET's second letter to Seneca's supervisor stated repeatedly that Seneca's behavior was preventing USET from working cooperatively with ATSDR. Regardless of the context in which Seneca was allegedly harassing USET employees, the named defendants felt a need to complain about Seneca in order to preserve the working relationship with ATSDR - a relationship that exists because of the self-determination contract.

C. Did Seneca Exhaust His Remedies Under the FTCA?

Seneca also disputes that he failed to exhaust his administrative remedies under the FTCA even if the United States is the proper defendant. We

disagree.[5]

A tort claim may not be brought against the United States "unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail." 28 U.S.C. § 2675(a). This requirement is jurisdictional, and failure to provide this notice prevents judicial review of the claim. Dalrymple v. United States, 460 F.3d 1318, 1324 (11th Cir. 2006).

Seneca asserts that the affidavit he submitted as part of his internal grievance to ATSDR, as his employer, challenging his reassignment served as adequate notice under the FTCA. The affidavit stated that the complaints made against him in USET's letters were false, and Seneca argues that the affidavit thereby satisfies the FTCA notice requirement. This affidavit did not, however, "present" Seneca's tort claims against ATSDR as the employer of USET's employees who had allegedly committed torts against Seneca; Seneca's affidavit did not refer to any of the torts enumerated in his complaint. Instead, the affidavit focused on his displeasure at being reassigned by his employer on the basis of the employer's investigation into complaints about his conduct. The affidavit said nothing about tortuous conduct by

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5/ We review de novo the district court's dismissal for lack of subject matter jurisdiction. Broward Gardens Tenants Ass'n v. EPA, 311 F.3d 1066, 1072 (11th Cir. 2002).

ATSDR employees, or by the Federal government through vicarious liability, nor mention any intention by Seneca to pursue a tort claim on that basis. This does not satisfy the FTCA notice requirement.

CONCLUSION

For the foregoing reasons, the district court's substitution of the United States as the defendant and the subsequent dismissal of this case is **AFFIRMED**.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA - ATLANTA DIVISION

No. 1:07-cv-1705-TCB

DEAN SENECA,

Plaintiff,

- v -

UNITED SOUTH AND EASTERN TRIBE, INC., JAMES T. MARTIN, BRENDA E. SHORE and LISA BERRIOS,

Defendants.

DECIDED: January 10, 2007

ORDER

I. Background

On July 5, 2006, Defendant James Martin, who at than time was acting executive director of Defendant United South and Eastern Tribes, Inc. ("USET"),[1] filed a complaint with the Agency for Toxic

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1/ USET is a tribal organization comprised of twenty-five federally-recognized American Indian tribes served by the Nashville area office of the Indian Health Service, an agency of HHS. USET tribes are located in Maine, Massachusetts, Rhode Island, Connecticut, New York, North Carolina, South Carolina, Mississippi, Alabama, Florida, Louisiana and Texas.

Substances and Disease Registry ("ATSDR"), an agency within the Department of Health and Human Services ("HHS"), against Plaintiff Dean Seneca.[2] At the time, Seneca was the Director of ATSDR's Office of Tribal Affairs.

In his letter, Martin expressed concerns about Seneca's unprofessional conduct during interactions between Seneca and USET staff members during the spring of 2006. These interactions occurred in conjunction with the preparation of testimony by USET representative before HHS in March and May of 2006 regarding the agency's budget for the fiscal year 2008.

Specifically, Martin stated that his "staff members have felt threatened and bullied if they did not bend to [Seneca's] wishes or his point of view." Further, Martin complained that Seneca had "made several slanderous comments regarding USET's integrity and competency" and that he had also "made personally slanderous remarks about me and other staff members."

After obtaining additional evidence of Seneca's allegedly inappropriate behavior, including a memorandum from Lisa Berrios - a USET employee who had heard several of Seneca's disparaging

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2/ Martin resigned from his position as executive director soon after submitting the complaint. Brenda Shore then took over as the interim executive director and became the point of contract at USET for the remainder of the complaint process against Seneca.

comments[3] - Seneca's supervisor issued an official reprimand directing Seneca to cease his duties as Director of OTA and reassigning him to an unrelated branch of ATSDR. The decision stated that Seneca had "seriously impeded ATSDR from advancing its public health mission in communities that it seeks to assist since USET represents many tribes."

One of USET's duties is to perform health board-type functions for the tribes in the IHS Nashville area. These functions include facilitating interaction between member tribes and federal and state agencies, including HHS and IHS, with health-related missions; providing technical assistance and support to health programs operated at the local tribal level; serving as the representative for federal Indian health policies, programs, and funding in accord with priorities of member tribes; and working with tribes and health boards in other IHS areas to advocate on behalf of the health needs of Indian country.

These programs and duties would normally be performed by HHS and its agencies. However, pursuant to the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450, *et seq.*, the Secretary of HHS has entered into a self-determination contract with USET and thereby has delegated these programs and duties to USET to

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3/ According to Berrios, Seneca called Shore a "bitch" and stated that she was performing her job responsibilities poorly.

perform.[4] 25 U.S.C. § 450f(a)(1)(B). In return for its assumption of various duties under the contract, USET receives funding to support the programs it then administers.

On July 23, 2007, Seneca filed this action against USET, Martin, Berrios and Shore for libel, interference with employment, 'intentional infliction of emotional distress, invasion of privacy, and injury to peace, happiness, and feeling, based on the July 2006 communications from Martin, Berrios and Shore to ATSDR.

On October 17, 2007, Sally Yates, Acting United States Attorney for the Northern District of Georgia, filed a certification pursuant to the Federal Employees Liability Reform and Tort Compensation Aft of 1988,

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4/ Seneca contends that the self-determination contract between HHS and USET is not valid because it does not contain tribal resolutions from all the relevant tribes and because HHS, via IHS, is not required by law to provide the services delegated to USET. Even assuming that Seneca has standing to challenge the validity of the contract, his arguments fail. First, the ISDEAA permits HHS to enter into a self-determination contract with a tribal organization "upon the request of *any* Indian tribe by tribal resolution." 25 U.S.C. § 450f(a) (emphasis added). This contract supported by twenty-four tribal resolutions, more than satisfies the ISDEAA's requirement. Second, there is no requirement in the ISDEAA that the services delegated to the tribal organization be those HHS is "required by law" to provide. Rather, the ISDEAA permits delegation of any services that HHS is "authorized" to administer. *Id.* at § 450f(a)(1)(B).

28 U.S.C. § 2679(d) (the "FTCA"), that Martin, Berrios and Shore were acting within the scope of their employment at the time of the incidents giving rise to Seneca's tort claims.[5] Based on Yates's certification, the United States then filed a notice of substitution with this Court, seeking to be substituted as the party-Defendant in this action. Pending the Court's determination regarding substitution, the United States has also filed a motion to dismiss for lack of subject matter jurisdiction.

II. Substitution

The FTCA provides that upon certification by a U.S. Attorney that a federal employee was acting within the scope of his employment at the time of an incident giving rise to a tort claim, any civil action arising out of the incident "shall be deemed an action against the United States . , . .and the United States shall be substituted as the party defendant." 28 U.S.C. § 2679(d)(1); 28 C.F.R. § 15.4. A U.S. Attorney's certification provides prima facie evidence that the federal employee was acting within the scope of his employment. *Flohr v. Mackovjak*, 84 F.3d 386, 390 (11th Cir. 1996). However, although the plaintiff then bears "[t]he burden of . . . proving that the employee acted outside the scope of employment," that burden is slight and a district court must make a *de novo* `scope of employment' determination once a plaintiff challenges the certification. *S.J. & W. Ranch, Inc. v. Lehtinen*, 913 F.2d 1538, 1543 (11th Cir. 1990).

5/ The Attorney General has delegated certification authority to the United States Attorneys. 28 C.F.R. § 15.4.

Here, Acting U.S . Attorney Yates has filed a certification with the Court, which Seneca has challenged. As a result, this Court must make a *de nova* determination of whether the United States should be substituted as the Defendant.

Seneca first facially challenges the substitution of the United States as the Defendant by claiming that Yates's certification is deficient. Although he does not dispute that Yates's certification meets the requirements of 28 U.S.C. § 2679(d) - it expressly states that the USET employees were acting within the scope of their employment at the time his claims arose - he contends that § 450f(d) of the ISDEAA requires the U .S . Attorney to further certify that his claims arose during the employees' performance of a self-determination contract . The Court disagrees with Seneca's characterization of the ISDEAA's requirements.

Section 450f(d) of the ISDEAA states the following:

> With respect to claims resulting from the performance of functions . . . under a contract . . ,authorized by the [ISDEA.A] . . ., an Indian tribe, tribal organization or Indian contractor is deemed hereafter to be part of . . .the [IHS] in the [HHS] while carrying out any such contract or agreement and its employees are deemed employees of [HHS] while acting within the scope of their employment in carrying out the contract or agreement.

25 U.S.C. § 450f(d). Therefore, although it is true that whether the employees were performing functions under a self-determination contract at the time Seneca's claims arose is a relevant inquiry, the ISDEAA does not impose an additional requirement on the U.S. Attorney to certify that fact.[6] As a result, Seneca's argument that substitution should be denied due to a facial deficiency in Yate's certification fails.

Seneca also substantively objects to the United States' substitution. He contends that his claims did not actually arise from the USET employees' performance of a self-determination contract and therefore the requirements of 25 U.S .C. § 45of(d) are not met. Specifically, he argues that because USET representatives were not testifying solely on behalf of USET's member tribes before HHS, but rather appeared on behalf of the entire American Indian population, USET's employees could not be carrying out the self-determination contract between USET and HHS when Seneca's claims arose. The court again disagrees with Seneca's construction of the ISDEAA

6/ Seneca cites *Walker v. Chugachmiut*, 46 Fed. App'x 421 (9th Cir. 2002), for the proposition that the U.S. Attorney's certification must include a statement regarding the employees' performance of a self-determination contract. However, the Ninth Circuit did not address this issue in *Walker*, but merely held a U.S. Attorney's certification that did include such language sufficient. *Id.* At 424. Consequently, *Walker* is inapposite.

and of the terms of the self-determination contract.

It is true that Seneca's claims indirectly arose out of USET's employees' testimony before HHS in 2006. It is also true that the purpose of that testimony was to represent the greater tribal population in informing HHS of the most important public health issues facing American Indians and to propose funding to address those issues.

However, the contract that USET entered into with HHS in part binds USET to "facilitate meaningful consultation between agencies of [HHS] and tribes." Notably, there is no express limitation in this clause to *member* tribes. Based on this clause, USET's preparation for and performance of its testimony before HHS in spring 2006, even though on behalf of the entire American Indian population, seems to be encompassed in the delegated duties USET contracted to perform.[7]

Even assuming the USET representatives' testimony before HHS is not encompassed within the

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7/ Additionally, Seneca's claims most directly arise from the letter communications from Martin, Shore and Berrios to ATSDR complaining about his behavior and communication style. Those written complains explain that Seneca's actions had "negatively affected his interaction with Tribal representatives" and "may reflect negatively on ATSDR." This dialogue between Martin, Shore, Berrios and ATSDR also advances the self-determination contract's purpose of facilitating meaningful consultation between USET and one of HHS's agencies.

language of the just-quoted clause of the contract, the Court is convinced that FTCA coverage for USET's employees is still appropriate under these facts . This is because the ISDEAA directs HHS to delegate the "administrative functions" necessary to carry out the substantive programs in addition to the delegation of those programs to tribal organizations. 25 U.S.C. § 450f(a)(1). There is no doubt that information-gathering and budget-formulation for the upcoming year are key administrative functions that further the substantive goals and programs HHS delegated to USET . As a result, USET's employees should, and do, enjoy FTCA coverage while performing these administrative functions in conjunction with HHS.

Consequently, in light of the contract's directive that its "provision[s] . . .shall be liberally construed for the benefit of' USET, the Court is convinced that the USET employees were performing under the self-determination contract at the time Seneca's claims arose. As a result, Seneca's substantive challenge to the United State' substitution as the Defendant in this action similarly fails.[8]

Accordingly, because the U.S. Attorney's certification is sufficient, and because the USET

8/ Seneca also argues that there is no valid self-determination contract between USET and HHS and that as a result the USET employees could not be acting pursuant to it at the time his claims arose. However, the Court has already determined that his arguments on this point have no merit and that a valid self-determination contract exist.

employees were acting within the scope of their employment[9] and performing under a self-determination contract at the time Seneca's claims arose, 28 U.S.C. § 2679(d) is satisfied; the United States is hereby SUBSTITUTED as the sole party-Defendant in this action.

III. Motion to Dismiss

The United States, having been substituted as the Defendant, next moves to dismiss Seneca's action for lack of subject matter jurisdiction. Specifically, the United States contends that Seneca has not filed an administrative tort claim with the ATSDR, which is required by 28 U.S.C. § 2675(a).

Section 2675(a) states that:

> An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death . . . unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail.

See also McNeil v. United States, 508 U.S. 106, 110-13 (1993). The requirement of administrative exhaustion

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9/ Seneca has not raised this issue in his response papers, and the Court regards his silence as a tacit admission that this element is met.

is jurisdictional and cannot be waived. *Id.* As a result, if Seneca did not file an administrative tort claim with ATSDR prior to initiating this suit, the Court does not have subject matter jurisdiction and must dismiss the action.

Seneca did submit a "Stage 2 Grievance" to the Centers for Disease Control - the controlling agency of ATSDR - on September 29, 2006. That grievance asserted that the statements the USET employees made about him were false, and it sought several forms of relief, including reinstatement of his position as the Director of OTA, removal of the formal reprimands that had been issued on September 12 and 19, and attorney's fees and costs.

Seneca contends that the submission of this grievance satisfies his duty under 28 U.S.C. § 2675(a) to submit an administrative tort claim to ATSDR. Specifically, he argues that his affirmation that USET's claims were false satisfied his statutory need to provide written notice of his libel claim and that his claim for attorney's fees and costs provided sufficient information to ATSDR to calculate the monetary damages he had suffered. The Court disagrees.

A plaintiff complies with § 2675(a) by filing "an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain for injury to or loss of property" with the relevant agency. 28 C.F.R. § 14.2(a). Although the Eleventh Circuit takes "a somewhat lenient approach to the `sum certain' requirement," *Tidd v. United States*, 786 F.2d 1565,

1567 n.6 (11th Cir. 1986), "the FTCA requires, at a minimum, that a claimant expressly claim a sum certain or provide documentation which will allow the agency to calculate or estimate the damages to the claimant." *Suarez v. United States*, 22 F.3d 1064, 1165 (11th Cir. 1994). For example, a plaintiff can satisfy § 2675(a) by "attaching to his claim medical bills and repair estimates totaling the exact amount of damages." *Dalrymple v. United States*, 460 F.3d 1318, 1325 (11th Cir . 2006) (citing *Molinar v . United States*, 515 F.2d 246 (5th dir. 1975)).

Nowhere in Seneca's grievance does a monetary sum appear, nor are any documents attached that would guide the CDC or ATSDR in calculating the damages Seneca was seeking . As a result, § 2675(a)'s requirements have not been met, and this Court does not have subject matter jurisdiction over Seneca's claims against the United States. See also *Rease v. Harvey*, 238 Fed. App'x 492, 495 (11th Cir. 2007) (holding § 2675(a) unsatisfied and jurisdiction lacking where the plaintiff requested the U .S. Army to correct his military records but did not "mention the FTCA or indicate potential damages" prior to bringing suit).

Accordingly, because Seneca did not exhaust his administrative remedies prior to bringing his cause of action, this Court does not have subject matter jurisdiction over his FTCA claims against the United States.

IV. Conclusion

For the foregoing reasons, the United States is SUBSTITUTED as the sole Defendant in this action, and its motion to dismiss [22] is GRANTED. The Clerk is DIRECTED to CLOSE this case.

It is so ORDERED this 10th day of January, 2008.

s/Timothy C. Batten, Sr.
TIMOTHY C. BATTEN, SR.
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

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08 - 11012 - EE

DEAN SENECA,

Plaintiff-Appellant,

- v -

UNITED SOUTH AND EASTERN TRIBES, et al.,

Defendants,

UNITED STATES OF AMERICA,

Defendant-Appellee.

DECIDED: December 11, 2008

Before: TJOFLAT, BLACK, and KRAVITCH, Circuit Judges. PER CURIAM:

The Petition(s) for Rehearing filed by the appellant are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petitions(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/Phyllis Kravitch
UNITED STATES CIRCUIT JUDGE

APPENDIX D

25 U.S.C. § 450f(a)(1). Self-determination contracts

(a) Request by tribe; authorized programs

(1) The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof, including construction programs—

. . . .

(C) provided by the Secretary of Health and Human Services under the Act of August 5, 1954 (68 Stat. 674), as amended [42 U.S.C. 2001 et seq.];

(D) administered by the Secretary for the benefit of Indians for which appropriations are made to agencies other than the Department of Health and Human Services or the Department of the Interior; and

(E) for the benefit of Indians because of their status as Indians without regard to the agency or office of the Department of Health and Human Services or the Department of the Interior within which it is performed.

The programs, functions, services, or activities that are contracted under this paragraph shall include admini-

strative functions of the Department of the Interior and the Department of Health and Human Services (whichever is applicable) that support the delivery of services to Indians, including those administrative activities supportive of, but not included as part of, the service delivery programs described in this paragraph that are otherwise contractable. The administrative functions referred to in the preceding sentence shall be contractable without regard to the organizational level within the Department that carries out such functions. (Emphasis added).

25 U.S.C. § 450l(c)
Contract or Grant Specifications -
Model Agreement

(2) Purpose.—Each provision of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) and *each provision of this Contract shall be liberally construed for the benefit of the Contractor to transfer the funding and the following related functions, services, activities, and programs (or portions thereof), that are otherwise contractable under section 102(a) of such Act, including all related administrative functions, from the Federal Government to the Contractor: (List functions, services, activities, and programs).* (Emphasis added).

APPENDIX E

President William J. Clinton

Executive Order 13175 - Consultation and Coordination With Indian Tribal Governments

[Federal Register: November 9, 2000 (Volume 65, Number 218)]

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian tribes; it is hereby ordered as follows:

Section 1. Definitions. For purposes of this order:

(a) ``Policies that have tribal implications'' refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

(b) ``Indian tribe'' means an Indian or Alaska Native tribe, band, nation, pueblo, village, or commun-

ity that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a.

(c) ``Agency'' means any authority of the United States that is an ``agency'' under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5).

(d) ``Tribal officials'' means elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations.

Sec. 2. Fundamental Principles. In formulating or implementing policies that have tribal implications, agencies shall be guided by the following fundamental principles:

(a) The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes.

(b) Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. As domestic

dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.

(c) The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.

Sec. 3. Policymaking Criteria. In addition to adhering to the fundamental principles set forth in section 2, agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have tribal implications:

(a) Agencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.

(b) With respect to Federal statutes and regulations administered by Indian tribal governments, the Federal Government shall grant Indian tribal governments the maximum administrative discretion possible.

(c) When undertaking to formulate and implement policies that have tribal implications,

agencies shall:

(1) encourage Indian tribes to develop their own policies to achieve program objectives;

(2) where possible, defer to Indian tribes to establish standards; and

(3) in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.

Sec. 4. Special Requirements for Legislative Proposals. Agencies shall not submit to the Congress legislation that would be inconsistent with the policymaking criteria in Section 3.

Sec. 5. Consultation. (a) Each agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications. Within 30 days after the effective date of this order, the head of each agency shall designate an official with principal responsibility for the agency's implementation of this order. Within 60 days of the effective date of this order, the designated official shall submit to the Office of Management and Budget (OMB) a description of the agency's consultation process.

(b) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications, that imposes substantial direct

compliance costs on Indian tribal governments, and that is not required by statute, unless:

(1) funds necessary to pay the direct costs incurred by the Indian tribal government or the tribe in complying with the regulation are provided by the Federal Government; or

(2) the agency, prior to the formal promulgation of the regulation,

(A) consulted with tribal officials early in the process of developing the proposed regulation;

(B) in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and

(C) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

(c) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications and that preempts tribal law unless the agency, prior to the formal promulgation of

the regulation,

(1) consulted with tribal officials early in the process of developing the proposed regulation;

(2) in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and

(3) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

(d) On issues relating to tribal self-government, tribal trust resources, or Indian tribal treaty and other rights, each agency should explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.

Sec. 6. Increasing Flexibility for Indian Tribal Waivers.

(a) Agencies shall review the processes under which Indian tribes apply for waivers of statutory and regulatory requirements and take appropriate steps to streamline those processes.

(b) Each agency shall, to the extent practicable and permitted by law, consider any application by an Indian tribe for a waiver of statutory or regulatory requirements in connection with any program administered by the agency with a general view toward increasing opportunities for utilizing flexible policy approaches at the Indian tribal level in cases in which the proposed waiver is consistent with the applicable Federal policy objectives and is otherwise appropriate.

(c) Each agency shall, to the extent practicable and permitted by law, render a decision upon a complete application for a waiver within 120 days of receipt of such application by the agency, or as otherwise provided by law or regulation. If the application for waiver is not granted, the agency shall provide the applicant with timely written notice of the decision and the reasons therefor.

(d) This section applies only to statutory or regulatory requirements that are discretionary and subject to waiver by the agency.

Sec. 7. Accountability.

(a) In transmitting any draft final regulation that has tribal implications to OMB pursuant to Executive Order 12866 of September 30, 1993, each agency shall include a certification from the official designated to ensure compliance with this order stating that the requirements of this order have been met in a meaningful and timely manner.

(b) In transmitting proposed legislation that has

tribal implications to OMB, each agency shall include a certification from the official designated to ensure compliance with this order that all relevant requirements of this order have been met.

(c) Within 180 days after the effective date of this order the Director of OMB and the Assistant to the President for Intergovernmental Affairs shall confer with tribal officials to ensure that this order is being properly and effectively implemented.

Sec. 8. Independent Agencies. Independent regulatory agencies are encouraged to comply with the provisions of this order.

Sec. 9. General Provisions.

(a) This order shall supplement but not supersede the requirements contained in Executive Order 12866 (Regulatory Planning and Review), Executive Order 12988 (Civil Justice Reform), OMB Circular A-19, and the Executive Memorandum of April 29, 1994, on Government-to-Government Relations with Native American Tribal Governments.

(b) This order shall complement the consultation and waiver provisions in sections 6 and 7 of Executive Order 13132 (Federalism).

(c) Executive Order 13084 (Consultation and Coordination with Indian Tribal Governments) is revoked at the time this order takes effect.

(d) This order shall be effective 60 days after

the date of this order.

Sec. 10. Judicial Review. This order is intended only to improve the internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person.

(Presidential Sig.)

WILLIAM J. CLINTON
The White House
November 6, 2000

APPENDIX F

President George W. Bush
September 23, 2004

Memorandum for the Heads of Executive Departments, and Agencies: Government-to-Government Relationship with Tribal Governments

The United States has a unique legal and political relationship with Indian tribes and a special relationship with Alaska Native entities as provided in the Constitution of the United States, treaties, and Federal statutes. Presidents for decades have recognized this relationship. President Nixon announced a national policy of self-determination for Indian tribes in 1970. More recently, Executive Order 13175, entitled Consultation and Coordination with Indian Tribal Governments, was issued in 2000. I reiterated my Administration's adherence to a government-to-government relationship and support for tribal sovereignty and self-determination earlier this year in Executive Order 13336, entitled American Indian and Alaska Native Education.

My Administration is committed to continuing to work with federally recognized tribal governments on a government-to-government basis and strongly supports and respects tribal sovereignty and self-determination for tribal governments in the United States. I take pride in acknowledging and reaffirming the existence and durability of our unique government-to-government relationship and these abiding prin-

ciples.

This commitment begins at the White House, where my Director of Intergovernmental Affairs serves as my White House liaison with all Indian nations and works with federally recognized tribal governments on an intergovernmental basis. Moreover, it is critical that all departments and agencies adhere to these principles and work with tribal governments in a manner that cultivates mutual respect and fosters greater understanding to reinforce these principles.

Accordingly, the head of each executive department and agency (agency) shall continue to ensure to the greatest extent practicable and as permitted by United States law that the agency's working relationship with federally recognized tribal governments fully respects the rights of self-government and self-determination due tribal governments. Department or agency inquiries regarding this memorandum, specifically those related to regulatory, legislative, or budgetary issues. should be directed to the Office of Management and Budget.

This memorandum is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or in equity, by a party against the United States, its agencies, entities, or instrumentalities, its officers or employees, or any other person.

GEORGE W. BUSH